

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010050500

ORDER GRANTING STUDENT'S
REQUEST FOR ADMISSION OF
DOCUMENTARY EVIDENCE

Student filed a due process complaint on May 17, 2010. The due process hearing took place before Administrative Law Judge (ALJ) Clifford H. Woosley, for seven (7) days, concluding on December 2, 2010, at which time the matter was continued to January 10, 2011, for submission of closing briefs. During the hearing, Student's counsel attempted to introduce documentary evidence which was not included in the exhibits exchanged with the District prior to hearing. District objected. Accordingly, the ALJ instructed Student's counsel to prepare a written motion, supported by declaration, demonstrating good cause for admission of the documents.

Student's counsel timely filed the motion, with supporting declarations, requesting admission of a April 22, 2008 psychological evaluation report by Dr. Bruce M. Gale and a September 13, 2006 LAUSD psychoeducational report. District filed opposition.

APPLICABLE LAW

A party to a due process hearing is entitled to receive from other parties to the hearing, at least five business days prior to the hearing, a copy of all documents that the parties intend to present at the hearing. Included in the documentation to be exchanged shall be all assessments completed by the date of exchange and recommendations based on the assessments that the parties intend to use at the hearing. (Ed. Code § 56505, subd. (e)(7).) A party has a right to prohibit the introduction of evidence at the hearing that has not been disclosed to that party at least five business days before the hearing. (34 C.F.R. § 300.512(a)(3) (2006).)

A due process complaint may set forth alleged violations that occurred not more than 2 years before the date the parent knew or should have know about the alleged action that form the basis of the complaint. (Ed. Code § 56505, subd. (l); 20 U.S.C. §1415(b)(6)(B).)

DISCUSSION

A prehearing conference (PHC) was held before ALJ Woosley on September 30, 2010. Counsel appeared for both Student and District. The ALJ and the attorneys reviewed the list of witnesses and proposed exhibits, set forth in the parties' previously filed PHC statements. In reviewing the Student's list of proposed exhibits, the ALJ noted that exhibit nos. 1 through 13 were dated from October 2005 through December 2006, which was far before the two-year limitation of May 17, 2008. ALJ invited Student's counsel to provide reason for these documents' admissibility, given the two-year limitation. ALJ Woosley heard argument from both counsel and, as part of the October 01, 2010 Order Following PHC, ruled as follows:

"Student's proposed Exhibits nos. 1 through 13 are stricken and shall not be marked, except that Exhibit 8 (report cards and CAT 6 Reports) and Exhibit 9 (OCR benchmark scores and math quarterly assessments) may be marked as evidence if within two years of the complaint's May 13, 2010 filing."

Dr. Gale's April 2008 report was listed as proposed Exhibit 16 in the Student's September 2010 Supplemental PHC Statement. The subsequent Order after PHC therefore did not strike Dr. Gale's report. Additionally, Student was not prohibited from including Dr. Gale's report in Student's Exhibit booklet.

Since the hearing dates were continued at the September 2010 PHC to late November 2010, a second PHC took place on November 8, 2010. The parties again submitted PHC statements, listing witnesses and exhibits. The ALJ did not review exhibits at the November 2010 PHC; the parties represented that they had already exchanged their exhibit booklets. The discussion centered on witnesses and scheduling.

Inexplicably, Student did not include Dr. Gale's report on the list of exhibits in the Student's PHC statement for the November 2010 PHC or in the exchanged Student's Exhibit booklet. During the hearing, Student's counsel or advocate attempted to question witnesses about Dr. Gale's report and have the report admitted as evidence. District objected, noting Dr. Gale's report was not included in the exhibits exchanged before hearing.

Student's counsel said Dr. Gale's report was not included because she believed the ALJ had excluded all exhibits which predated the two-year limitation date of May 17, 2008. Yet, Student's counsel included an October 2007 psychoeducational assessment as Student's Exhibit 4, which predated the two-year limitation. Further, the October 1, 2010 Order after PHC clearly and unambiguously struck proposed Student Exhibits 1 through 13, while allowing Exhibit 16 (Dr. Gale's report).

The Orders following the September and November 2010 PHCs both stated:

“Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.”

Student’s attempted use and admission of Dr. Gale’s report was not solely for rebuttal or impeachment. Therefore, the ALJ instructed Student’s counsel and advocate to file this motion. ALJ Woosley also instructed Student to include evidence and argument indicating when Dr. Gale’s report was given to the District.

In her declaration, Student’s counsel points out that the September 21, 2009 DMH assessment reflects that the District provided the DMH assessor with Dr. Gale’s April 2008 report. Student’s counsel concludes that Student’s mother therefore gave Dr. Gale’s report to District sometime between April 2008 and the September 2009 DMH assessment. However, there is no evidence regarding the circumstances under which the District obtained a copy of Dr. Gale’s report during this 18-month window.

Despite Student’s procedural miscues in not including Dr. Gale’s report in the exhibit exchange, District can point to little prejudice as a result. Dr. Gale’s report was listed in Student’s initial proposed exhibit list, District had prior possession of Dr. Gale’s report (as further evidenced by District’s production in response to Student’s request for school documents), Student’s elementary teacher participated in Dr. Gale’s evaluation process, and DMH reviewed Dr. Gale’s report (provided by District) in preparing the AB3632 assessment.

Accordingly, Student’s motion is granted and Dr. Gale’s report is admitted as evidence and will be given the weight deserved.

Also, District does not oppose the admission of the September 2006 LAUSD psychoeducational report and, therefore, the report is admitted as evidence.

ORDER

1. The Student’s motion is granted.
2. Dr. Bruce M. Gale’s April 22, 2008 psychological evaluation report is admitted as evidence.
3. The September 13, 2006 LAUSD psychoeducational report is admitted as evidence.

4. Student shall immediately lodge both documents with OAH and serve on District.

Dated: December 14, 2010

/s/

CLIFFORD H WOOSLEY
Administrative Law Judge
Office of Administrative Hearings